In the Supreme Court

OF THE

United States

OCTOBER TERM, 1961

No. 356

[illegible] BURTON,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

On February 21, 1961, the District Court of Appeal, First Appellate District, Division Two, filed a decision and opinion affirming an order of the Superior Court of the City and County of San Francisco denying petitioner's application for a writ of error *coram nobis*. (*People v. Burks*, 189 A.C.A. 329, 11 Cal. Reptr. 200.) Petition for rehearing was de-

nied on March 23, 1961 and the Supreme Court of California denied a hearing on April 19, 1961.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under title 28, U.S.C. section 1257(2).

QUESTIONS PRESENTED

1. Whether on the basis of the record in the instant case there is such an insufficiency of evidence so as to render petitioner's conviction of murder in the first degree a denial of due process of law.

2. Whether the decision of the District Court of Appeal rests on an adequate state ground and is thus not properly subject to review on certiorari.

STATEMENT OF THE CASE

On July 17, 1958, petitioner was charged by indictment with murder in the first degree. On January 5, 1959, a jury was empaneled and trial commenced. Petitioner was found guilty as charged and on January 22, 1959, jury determination of the penalty having been waived, the Court sentenced petitioner to state prison. No appeal was taken from the judgment. (See 189 A.C.A. 329, 330, 11 Cal. Reptr. 200, 201.)

On November 25, 1959, petitioner filed in the Superior Court of the City and County of San Francisco, a *pro-se* document denominated "Petition for the Writ of Error Coram Nobis and Motion for the Reduction of Sentence" (CT 1-4). On December 1, 1959, the petition and motion were denied *ex parte* (CT 20) and on December 9, 1959, petitioner noticed an appeal from the order of denial (CT 20-22). As noted above, the District Court of Appeal affirmed the order, and petitions for rehearing and for hearing in the Supreme Court of California were denied.

STATEMENT OF FACTS

At the trial, it was stipulated that appellant shot and killed the victim, one Alex Wilson. (RT 1, 75.) The following evidence disclosed the circumstances surrounding the homicide:

On July 5, 1958, petitioner Burks was driving his car on O'Farrell Street in San Francisco. With him were his wife Janet and two friends, Mr. and Mrs. Woods. (RT 268, 367.) Nearing his home, Burks saw an open space along the curb and started to back into it when one Wilson, the victim, drove up behind Burks and interfered with his attempt to park. (RT 269, 367-368, 469.) There was apparently no contact between the two vehicles at this time. (See below, and RT 85, 115, 275.)

Burks got out of his car without any assistance and went over to Wilson. (RT 84, 89, 116, 272.) The two

swore at each other, Burks calling Wilson a "black son of a bitch" and threatening, in an obscene manner, to beat him up. (RT 84, 369.) Wilson expressed disbelief. (RT 84.) Then Mrs. Burks, as she was leaving Burks' car, accidentally hit the gearshift or the accelerator, causing the car to back against Wilson's. (RT 85, 114, 115, 275.)

Wilson obtained a bumper jack which he waved in the air. (RT 29, 349.) But when Burks' son-in-law, at the request of Mrs. Burks, drove the car off (RT 167, 275), Wilson put the tool back in his trunk. (RT 153, 163, 173, 532-533.)

No blows were struck in the course of this encounter (RT 31, 274, 532), the two being no closer than ten feet during this time. (RT 361.) Burks, however, testified that Wilson hit him with the jack. (RT 512.) During this time, Wilson was alone while Mr. and Mrs. Woods were with Burks and his wife, together with one Brad Holloway, who happened upon the scene. (RT 347.)

After a few minutes of argument Burks left, saying that he would be back. (RT 31, 86.) Holloway, in an effort to end the argument, escorted Burks across the street. (RT 258, 350.) Burks, without assistance, climbed three flights of stairs to his apartment. (RT 477-478.) There he got out his revolver, loaded it with six rounds (RT 220, 258-259), and put it in his pocket. Burks then went down to the street (RT 220) and walked from his house, again without assistance, although there was testimony that he was limping. (RT 421.)

Burks walked out into the street (RT 193-194) but did not cross the center line. (RT 137.) The pistol was partially visible in Burks' pocket. (RT 124.) Somebody called to Wilson, who was unloading his car (RT 66), that Burks had a gun. (RT 93, 135, 154.) Wilson stepped out from behind his car and turned in the direction of Burks (RT 49, 534), and took two or three steps toward him. (RT 55-56, 155.) Wilson had nothing in his hands, and kept them at his side. (RT 33-34, 56, 139, 163, 203.)

Mrs. Burks went over to her husband to stop him from shooting Wilson. (RT 156, 158.) He shoved her aside and called to Wilson that he was going to shoot him. (RT 162.) Burks pulled out his revolver and shot Wilson from a distance of from six to twenty feet. (RT 159, 187, 193, 261.) There were no powder marks on the body. (RT 5.)

Burks testified that he had been partially paralyzed as the result of a previous industrial injury (RT 468), and that he shot Wilson because the latter was coming after him with a bumper jack. (RT 528.) He admitted two prior felony convictions. (RT 523.) The tool, however, was subsequently found in the locked trunk of Wilson's automobile. (RT 204-206, 223.)

ARGUMENT

I

PETITIONER'S FIRST DEGREE MURDER CONVICTION FINDS SUPPORT IN THE EVIDENCE

Petitioner contends that his conviction of murder in the first degree was in violation of his constitutional rights because there was no evidence to support it. In support of his contention he relies upon *DeJonge v. Oregon,* 299 U.S. 353, and *Thompson v. Louisville,* 362 U.S. 199, which hold that a total insufficiency of either the pleading or the evidence to support a conviction will amount to a denial of due process. Respondent does not disagree with those decisions and is somewhat inclined to accept the theoretical soundness of petitioner's extension of the principles enunciated in those decisions, to the situation where the evidence, though sufficient to support a conviction of an included offense, is insufficient to support a conviction of a higher degree crime. But both of petitioner's arguments, and the *DeJonge* and *Thompson* cases, are simply not applicable to the record at bar.

Throughout the petition, it is asserted that the District Court of Appeal agreed with petitioner's contention that the evidence did not support a conviction of murder in the first degree. As a matter of record, however, the District Court of Appeal considered petitioner's argument relating to the asserted insufficiency of the evidence and summarily rejected it, stating, "the evidence does not require a conclusion in accord with appellant's views." (189 A.C.A. at 331, 11 Cal.

Reptr. at 201.) As will be seen, this disposition of the question was manifestly correct. And when it is demonstrated that petitioner's constitutional argument finds no support in the record, then his attempt to obtain a writ of certiorari must necessarily fail.

Under California law "All murder which is perpetrated . . . by any . . . wilful, deliberate and premeditated killing . . . is murder of the first degree. . . ." (Cal. Pen. Code §189.) And "proof of deliberation, premeditation and wilfulness may be inferred from facts and circumstances which furnish a reasonable foundation for such a conclusion." (*People v. Brubaker,* 53 Cal. 2d 37, 40, 346 P. 2d 8, 9.) Applying these rules to the facts of this case, it is readily apparent that the conviction of first degree murder is supported by the evidence. Note that petitioner voluntarily left the scene of the argument, went upstairs to his apartment, got out his revolver and loaded it, returned to the street, shoved his wife aside when she attempted to dissuade him from his purpose, declared his intention to shoot Wilson and then shot him dead. Such a record is hardly an appropriate vehicle for an assertion that the evidence is insufficient to support a conviction of first degree murder, let alone that such insufficiency assumes constitutional proportions.

II

THE DECISION OF THE DISTRICT COURT OF APPEAL RESTS ON ADEQUATE STATE GROUNDS

In *Williams v. Kaiser,* 323 U.S. 471 at 477, this Court declared that

> "it is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause (citations). And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Here, the decision of the District Court of Appeal, in addition to determining that petitioner's claim of insufficiency was not supported by the record, went on to hold that in any event the writ of error *coram nobis* is not the appropriate procedural device for a post-conviction review of the sufficiency of the evidence. This ground of the decision is in accord with well-established California law. (See *People v. Blalock,* 53 Cal. 2d 798, 3 Cal. Reptr. 137; *People v. Martinez,* 88 Cal. App. 2d 767, 199 P. 2d 375.)

Moreover, California, in refusing petitioner relief in the nature of the writ of error *coram nobis,* has not necessarily precluded him from challenging the constitutional validity of the judgment in a post-conviction proceeding. Under California law, the writ of habeas

corpus might still be available to him in the Courts of this state, and if it is, then the writ will lie to review the sufficiency of the evidence to support the judgment of conviction if that evidence does, in fact, fail completely to show that the murder was committed by petitioner. (See, e.g., *Neal v. State,* 55 A.C. 11, 9 Cal. Reptr. 607.) Since California does afford petitioner a procedure for litigating his claim of a denial of due process, and since petitioner has not as yet chosen to avail himself of such remedy, his attempt to obtain relief in this Court is premature. (*Williams v. Kaiser,* supra.)

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

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